

BEFORE THE
SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A CEASE AND
DESIST ORDER ISSUED BY THE
DEPARTMENT OF ECOLOGY TO JOHN
A. AND ESTHER NELSON

JOHN A. NELSON,

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY,

Respondent,

LLOYD F. FULLER AND
MARGARET C. FULLER,

Intervenors.

SHB No. 79-11

FINAL FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER

This matter, the appeal of a Department Ecology shoreline regulatory order issued under WAC 173-14-180, came on for hearing before the Shorelines Hearings Board, Dave J. Mooney, Chairman, Chris Smith, David Akana, and Rodney Kerslake convened at Seattle, Washington on April 27, 1979. The hearing was

1 continued, resuming on May 3 and concluding on May 4, 1979. The above
2 members were also then present with the exception of Rodney Kerslake
3 who has heard tapes or has read a transcript of the evidence which he
4 did not hear. Hearing examiner William A. Harrison presided.

5 Appellant John A. Nelson appeared by his attorney, Stephen S.
6 Bassett. Respondent, Department of Ecology, appeared by Robert V.
7 Jensen, Assistant Attorney General. Intervenors, Lloyd F. and Margaret
8 C. Fuller, appeared by their attorney, Stephen J. Crane. Reporters
9 Jamie R. Dean and Mark Horila recorded the proceedings.

10 Witnesses were sworn and testified. Exhibits were examined. Having
11 heard or read the testimony, having examined the exhibits, having
12 heard and read the argument of counsel and being fully advised,
13 the Shorelines Hearings Board makes these:

14 FINDINGS OF FACT

15 I

16 The appellant, John A. Nelson, owns a waterfront, residential
17 lot on Lake Sammamish in Redmond. He proposes to build a single-
18 family residence on it.

19 The intervenors, Mr. and Mrs. Fuller, own and reside in the
20 residence neighboring on the north. The residences near appellant's
21 lot, including the Fullers, are not set back a uniform distance from
22 the water. The Fuller house, for example, is set back some 64 feet
23 from the water while the neighboring residence to the other side
24 (south) of appellant's lot is set back some 145 feet.

25 Lots in the area originally ran from the water's edge to the road
26 behind, West Lake Sammamish Parkway N.E. Appellant's lot, however,

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1 is the lakeward lot of three created when a predecessor divided
2 the original, full length lot. Appellant's lot is therefore some
3 100 feet in depth while those to either side and nearby are
4 approximately three times that depth. Appellant's proposed residence
5 would be set back 20 feet from the rear lot line, 15 feet from the
6 north lot line, five feet from the south lot line and 25 feet from
7 the ordinary high water mark of Lake Sammamish.

8 Prior to appellant's purchase of the lot in question, Redmond
9 adopted and respondent, Department of Ecology, approved the Redmond
10 Shoreline Master Program (approved by Department of Ecology September 20,
11 1974; WAC 173-19-250(19); hereafter "master program"). The master program
12 imposes a 20 foot setback from the ordinary high water mark of Lake
13 Sammamish. Appellant's proposed residence complies with the provisions of
14 the master program, the Redmond building code and the Redmond zoning
15 code.

16 Appellant's proposed residence would reduce the Fuller's view
17 by some 30 degrees, only part of which presently constitutes lakeview.
18 Any reasonable residence constructed on appellant's lot would reduce
19 the Fuller's view to nearly the same extent. The evidence was
20 inconclusive regarding the effect which appellant's proposed residence
21 would have on neighboring property values.

22 II

23 Appellant purchased the lot, and intends his proposed residence,
24 for his own use and that of his family. Esther Nelson, appellant's
25 former wife, has no interest in the subject property now or at the time
26 of the regulatory order presently on appeal.

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III

on December 21, 1978, appellant applied for a Redmond building permit for construction of his residence described above. On request of intervenors, respondent investigated the appellant's proposed residence and expressed to Redmond officials the Department's concerns later expressed in its regulatory order now on appeal before us.

After considering appellant's building permit application under Redmond ordinances and the concerns advanced by respondent, Department of Ecology, Redmond issued its building permit to appellant on February 5, 1979. Governmental approval of appellant's proposed residence is categorically exempt from the requirement of an environmental impact statement. WAC 197-10-170(1)(a) and (1).

IV

Acting upon his Redmond building permit, appellant poured the foundation for his proposed residence. On February 8, 1979, Department of Ecology issued a regulatory order under WAC 173-14-180 to appellant (DE 79-151) which required appellant to cease and desist from further construction and restore the shoreline to its condition prior to commencement of construction. From this regulatory order, appellant appeals under WAC 173-14-190.

V

Any Conclusion of Law which should be deemed a Finding of Fact is hereby adopted as such.

From these Findings, the Board comes to these

CONCLUSIONS OF LAW

I

Having raised the issue of its jurisdiction over appeals from

1 regulatory orders issued under WAC 173-14-180, the Shorelines Hearings
2 Board concludes that it lacks jurisdiction to hear such appeals because
3 WAC 173-14-190 conferring such jurisdiction upon us is beyond the frame-
4 work and policy of the Shoreline Management Act of 1971 (SMA),
5 chapter 90.58 RCW, and thus void.

6 The SMA is comprehensive in scope. It expressly grants
7 authority to the Shorelines Hearings Board (Board) to review appeals
8 regarding the granting, denying or rescinding of permits under the
9 Act (RCW 90.58.180(1) and (2)) and appeals by local government
10 of master programs (RCW 90.58.180(4)). Although the Act grants
11 no further express authority to the Board, there are several express
12 provisions which round out a full scheme for adjudication and
enforcement of the Act without involvement of the Board.

14 The first of these provides for criminal fines (RCW 90.58.220)
15 and the second provides for damages (RCW 90.58.230). The Department
16 of Ecology has conceded that these are matters which are beyond the
17 purview of the Board and properly belong to the courts. The third
18 such provision (RCW 90.58.210) states:

19 "Court actions to insure against conflicting
20 uses and to enforce. The attorney general or the
21 attorney for the local government shall bring such
22 injunctive, declaratory or other actions as are
23 necessary to insure that no uses are made of the
shorelines of the state in conflict with the
provisions and programs of this chapter and to
otherwise enforce the provisions of this chapter.
(Emphasis added.)

24 This provision on injunctive or declaratory relief, like the others
25 on criminal fines and damages, identifies the courts as the
appropriate forum and not the Board. There is no implication that

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1 a proceeding before the Board is a necessary prerequisite to
2 injunctive or declaratory relief.

3 Against this statutory background Department of Ecology has
4 adopted the following rules:

5 WAC 173-14-180 REGULATORY ORDERS BY LOCAL
6 GOVERNMENT OR THE DEPARTMENT. (1) Local government
7 and the department shall have the authority to serve
8 upon a person undertaking, or about to undertake
9 development as defined in RCW 90.58.030(3)(d), a
10 regulatory order if:

11 (a) The development constitutes an integral part
12 of a project being undertaken, or about to be under-
13 taken, on the shorelines of the state in the absence
14 of a substantial development, conditional use, or
15 variance permit; or

16 (b) The development being undertaken, although
17 an integral part of a project approved by an existing,
18 valid substantial development, conditional use, or
19 variance permit is outside the scope and intent of
20 said permit; or

21 (c) The development being undertaken on the
22 shorelines of the state is in violation of chapter
23 90.58 RCW, and/or one of the following:

24 (i) Prior to the formal adoption or approval
25 by the department of a master program for the area,
26 the guidelines and regulations of the department, and
27 so far as can be ascertained, the master program being
developed for the area.

(ii) Thereafter this regulation of the department
and the adopted or approved master program for the area.

(2) The regulatory order shall set forth or contain:

(a) The specific nature, extent and time of
violation, and the damage or potential damage;

(b) An order that the violation or the potential
violation cease and desist or, in appropriate cases,
the specific corrective action to be taken within a
specific and reasonable time; and

(c) The right of the person to whom the order is
directed to a hearing before the shorelines hearings
board.

(3) A regulatory order issued pursuant hereto
shall become effective immediately upon receipt by the
person to whom the order is directed and shall become
final unless review is requested pursuant to WAC 173-14-190.

WAC 173-14-190 HEARINGS ON REGULATORY ORDERS. (1)
The person to whom the regulatory order is directed may
request review to the shorelines hearings board within

thirty days after being served. The requirements of RCW 90.58.080(1) and chapter 461-08 WAC shall apply to all said requests for review: PROVIDED, HOWEVER, That there shall be no requirement for such requests to be filed with and certified by the department and the attorney general.

(2) All hearings held pursuant to this provision and judicial review thereof shall be in accordance with the rules establishing the shorelines hearings board contained in chapter 90.58 RCW and to chapter 461-08 WAC.

The effect of these rules is to place before this Board, with request for affirmation, orders which at once declare a violation of the shoreline law and mandate or prohibit action by the party receiving it. The SMA does not give this Board specific authority to hear and decide appeals of such orders.

The State Supreme Court applied the following test in reviewing the authority of a state agency:

It is well settled in this state, as elsewhere, that a public service commission, such as the department of public service in this state, is an administrative agency created by statute and as such has no inherent powers, but only such as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted.

State ex rel. P.U.D. v. Dept. of Public Service, 21 Wash.2d 201, 208, 209, 150 P.2d 709 (1944). Accord, Ortblad v. State, 85 Wash.2d 109, 530 P.2d 635 (1975), Burlington Northern, Inc. v. Johnston, 89 Wash.2d 321, 572 P.2d 1085 (1977). While the injunctive jurisdiction conferred upon this Board by WAC 173-14-190 is not abstractly inappropriate, such jurisdiction is not necessarily incident to the exercise of the express statutory jurisdiction of the Board, nor a necessary antecedent to injunctive relief by court action as called for in the Act (RCW 90.58

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1 .210, supra). Such jurisdiction therefore fails the test of state
2 agency authority set out above.

3 An agency may not legislate under the guise of the rule making
4 power and may not alter or amend an act. Rules must be written
5 within the framework and policy of the applicable statutes.
6 Burlington Northern, Inc. v. Johnson, 89 Wash.2d 321, 572 P.2d
7 1085 (1977), Public Disclosure Com'n v. Rains, 87 Wash.2d 626,
8 555 P.2d 1368 (1976), Allen v. Employment Security Dep't., 83
9 Wash.2d 145, 516 P.2d 1032 (1973). Kitsap-Mason Dairymen v. Tax
10 Comm'n., 77 Wash.2d 812 (1970), Pringle v. State, 77 Wash.2d 569 (1970).
11 Pierce County v. State, 66 Wash.2d 728 (1965) and State ex rel
12 West v. Seattle, 50 Wash.2d 94 (1957). The language of the Act
13 directing injunctive or declaratory action to a court evinces
14 a legislative policy choice which places this relief with the
15 courts and not with this Board. We hold, therefore, that WAC 173-14-190,
16 conferring jurisdiction upon this Board as previously described,
17 alters and amends the Act, is beyond the framework and policy of the
18 Act when read as a whole, and is therefore void.

19 II

20 Any Finding of Fact which should be deemed a Conclusion of Law
21 is hereby adopted as such.

22 From these Conclusions the Board enters this

23 ORDER

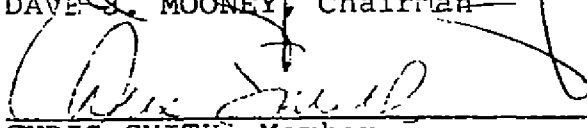
24 This matter is dismissed for lack of jurisdiction.


25
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1 DATED this 11th day of June, 1979.

2 SHORELINES HEARINGS BOARD

3 
4 DAVE S. MOONEY, Chairman

5 
6 CHRIS SMITH, Member

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8 DAVID AKANA, Member

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10 RODNEY KERBLAKE, Member
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